No. 80-1397

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In the Supreme Court of the United States

October Term, 1980

RONALD CARABBIA,

and,

PASQUALE CISTERNINO,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

REPLY BRIEF OF PETITIONERS

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Were it not for the seriousness of this case, the temptation to simply let the sophomoric flaws in the State's arguments fall under their own weight without comment would prevail. On the other hand, even though truly convinced there is no possible way this Court will be persuaded to adopt any of respondent's arguments, a Reply directed to only two of the issues in this cause is being offered.

Condensed, the most critical issues in this case involve the identification testimony of Debbie Spoth *and* the egregious and reprehensible summation made by the chief trial prosecutor. As to the former, apart from the fact that the photographic array used was slanted against Ronald Carabbia, and apart from even the fact that the identifica-

tion witness, Debbie Spoth, had previously passed over Ronald Carabbia's picture *many* times without even saying he resembled the suspect:

> "When he [the prosecutor] showed . . . [the photos of the *indicted* defendants to] her on February 16th, she looked at them, picked up Cisternino's, said 'That's the one the papers say did it, but that's not right. This man [*i.e.*, Ronald Carabbia] is more like him, but I've got to see him in person'." (A123.)

As to the scurrilous summation made by the prosecutor during the course of which he called defense counsel liars and stated they believed their clients were guilty, proof that these things happened should, without more, suffice to inspire this Court to make it perfectly clear that there are still limits beyond which no prosecutor may go in his quest for victory or personal glory.

I.

Dealing first with petitioners' contention that the eyewitness identification testimony was manipulated by the prosecutor, respondent states that "prosecutor Marino showed each witness separately a nine photograph array of the defendants." And, according to respondent, what "Debbie Spoth said [was] Carabbia's picture looked like the man in the rear of the car, but she would have to see him in person to be sure" (*Respondent's Brief*, p. 14). Ultimately, the State argues that because Debbie Spoth identified Carabbia at the trial and her husband did not, such was proof the procedure utilized was not suggestive (*id.*, at 16).

What counsel obviously fails to comprehend about our complaint is that, *given* the description supplied by the Spoths as fitting to varying degrees the man in whose place Carabbia was convicted, the State cannot justify (1) the

prosecutor submitting to the jury *only* pictures of the *defendants,* and (2) the prosecutor making himself the *sole* witness as to the various things that were said and done during this most critical confrontation.

The petitioner Carabbia has thus contended he was mistakenly identified by Debbie Spoth. Further, the contention is made that Ferritto's identification of Ronald Carabbia resulted from the fact that in preference to losing his deal with the State and Federal authorities, he simply agreed with Aratari (at the insistence of the agents) that Carabbia was in the car. Consistent with this position, it is here maintained that the witness Aratari's identification of Ronald Carabbia was likewise willfully inspired by the FBI agents in this case. Here, the facts show that even before Aratari told the agents Cisternino was not in the car with Ferritto, the agents realized the potential testimony by the Spoths that Cisternio was not in the car with Ferritto put their case in serious jeopardy unless other evidence could be *created.*

Thus, we contend that Aratari was manipulated into identifying a picture of Ronald Carabbia whose name had not been previously supplied by Aratari to his FBI interrogators as the person present on scene with him and at other places during the transpiration of events testified to by him. However, once Aratari picked Ronald Carabbia's picture, it was not even a mean feat to persuade Ferritto to change his story on this point to conform with Aratari's statement that it was Ronald Carabbia and not Cisternino. Relevant here is Ferritto's testimony that there was no lie he would not tell if he felt he could get away with it *and* it was in his interest to tell such a lie. Indeed, Ferritto virtually admitted that, in agreeing with Aratari, he had simply taken the path of least resistance. Here, the Record shows the following testimony by Ferritto:

By Mr. Willis:

Q. They came to you with a version which they believed was more credible because nobody's record could be worse than yours, and said we now believe that Carabbia was in the back seat of that car.

A. Yes, sir.

Q. Right? So, the path of least resistance was to go along with them, rather than—and if I'm wrong, you straighten me out—stick to your original story?

A. Yes, sir.

Q. Yes. But if you had continued to insist that Cisternino was in the back seat of that car, you knew the consequences were grave, didn't you?

* * * * *

A. There was a chance that I might not have gotten that deal, yes, sir.

Q. All right. Then we can understand that when these agents came to you, you talked about the status of your deal?

A. Yes. Somewhat.

Q. And you talked about the status of your deal before you made your new statements? We are waiting, Mr. Ferritto.

A. Yes, sir. Yes, sir.

Q. Yes. And you [had] talked about the deal before you put Cisternino in the back seat of that car, didn't you?

A. Yes, sir.

* * * * *

Q. All right. Then when it comes right down to the bottom line, the bottom line is that all of the

testimony that you have given in this case is in exchange for your deal?

A. Yes, sir.

Q. Right. Now, that's still another way of saying that the government bought and paid for your testimony with the consideration involved in the deal made with you.

A. Yes, sir, if you want to put it that way. Yes, sir.

All this makes it clear that the most critical testimony against Ronald Carabbia was the identification evidence provided by Debbie Spoth. It is here too that the specious and shallow arguments made in the State's brief actually reveal support for our thesis as outlined above. Here, we refer to the prosecutor's concession that "after Aratari was arrested and confessed, Ferritto was confronted with Aratari's statement and he admitted the lie." That said, we are then told "[1] The reason Prosecutor Marino could not state his reasons for suspecting that Carabbia was in the rear seat was because there was no substantive basis for believing that Ferritto lied. [2] The only conflict at that time was the Spoths' tentative identification of Carabbia's photo. [3] Only when Aratari was arrested was the State able to prove Ferritto lied by the use of Aratari's statement and Ferritto's admission that he lied" (*Id.*, at 17).

Our thesis is further augmented by the fact that Debbie Spoth, who had passed over Ronald Carabbia's picture on several occasions before she selected his picture from those shown her on February 16 as most resembling the suspect,[1] only testified when first asked in court that

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1. Debbie Spoth also admitted to having seen Ronald Carabbia's picture in the newspaper and on television.

she was "almost positive" (R 3276). Contrast this with the fact that when originally asked if she could identify the occupants of the car, her unequivocal response was "driver, yes" (R 3523-3524).

This then brings us to grips with the fact that Debbie Spoth was only shown, at this point, pictures of those under indictment in this case which made it quite predictable that she would pick Ronald Carabbia's picture as coming closest to the suspect. Since all of these photos, with the single exception of Ronald Carabbia's, were readily excludable for the obvious reason of the apparent ages of the parties involved, it tends to follow that the array was purposely slanted against Ronald Carabbia. (If not this then the hope had to be that the Spoths would agree with Ferritto that it was Cisternino.)

For our part, it is at least intellectually dishonest to assure this Court, as our prosecutor does, that before Debbie Spoth made her tentative identification of Ronald Carabbia "the State, FBI, ATF, Lyndhurst Police, and Cleveland police were *fully* convinced that Cisternino was in the rear seat of the car driven by Ferritto," which assurance was coupled with the indication that, at the time, the "State had no idea that anyone other than Cisternino was in the rear seat" (*id.*, at 15).

Stated another way, how can this prosecutor argue to this Court, in one breath, that the State[2] "fully" believed Cisternino was in the car when those photos were shown Debbie Spoth (*ibid.*) and, in another, say he suspected all along Ronald Carabbia was in the back but simply had no substantive basis for believing Ferritto had lied (*id.*, at 17).

---

2. Any doubt that Carmen Marino was included with others having this belief is verified by his further statment that "furthermore, on February 16th, the prosecutors and all the law enforcement officers connected with the case believed Cisternino was in the back seat" (Respondent's Brief, p. 16).

Distilled, more emerges here than the mere fact that Debbie Spoth's virtual insistence that Cisternino was *not* in the car seriously imperiled the State's case based, as it then was, in total reliance on Ferritto's version. The arrest of Aratari, whose vulnerability to suggestive interrogation (and his instinct for self-preservation), presented only the relatively easy task of convincing him the FBI believed Ronald Carabbia was in the car. This accomplished, the rest was easy.

Also, of no mean significance here, this Court should note that in the State's arguments in response to the identification issues are supported solely by the eloquence of counsel. In the course of what comes off as ravings, we are told any question raised as to the identification evidence in this case (which included whether the procedure used was conducive to irreparable misidentification) were "matters of fact on the jury to decide" (*id.*, at 17). And, we are told that the "trial court has no right or jurisdiction to decide matters of fact" (*ibid.*).

For our part, only one who has not read the controlling cases in this area would have made such an argument. However, the fact that such an argument was made shows what we have had to deal with in this case in trying to have our arguments properly evaluated.

Stated another way, the fact that the State does not cite a single case as support for *any* of the positions taken by it in this segment of its Brief exposes a basic lack of comprehension of the issues here involved. This assailment includes the statement that "no special instruction was necessary because there was never any mistaken identification" (*id.*, at 16). If counsel had understood the contention, he would have realized Carabbia was contending he was mistakenly identified by Debbie Spoth, not by her husband.

II.

The prosecutor's defense of the jury argument made by him borders on the ridiculous, for rather than defend against the categorical charge made in the petition that his conduct in making this particular summation was *unprofessional* and *unethical* in the extreme, the "cop out" response made is that it has never been proven any juror was "swayed or prejudiced by an attorney's comments" (*id.*, at 32). In addition, the asinine assertion is made to the effect that those cases holding such could possibly have occurred therein were decided "without any basis in fact to support such a contention" (*ibid.*).

Obviously then, according to this prosecutor who credits the Court with having "properly ruled [over defense objections] that Greene's relationship with the FBI was totally irrelevant" (*id.*, at 20), it was perfectly alright for him to argue to the jury as follows:

> Mr. Marino: The one concession we [that is, the State] made to the FBI is that we would not have them take the stand and publically acknowledge that a certain individual—
>
> Mr. Yelsky: Objection.
>
> Mr. Willis: There is no evidence as to that.
>
> Mr. Marino: (Continuing)—was an informant.

(*Petitioners' Appendices*, p. A103.)

Even this is not all, if counsel opposite is correct, it is not even possible that these petitioners were prejudiced by his imploration to the jury to convict because "every law enforcement agency connected with this case [*i.e.*, the F.B.I., A.T.F., U.S. Marshall's Service, the Cleveland Police, the Lyndhurst Police and others] knows without any doubt" that those being tried are guilty (*id.*, at

A127). Further, according to this prosecutor, because there is no evidence that the jurors were prejudiced, any argument that they were is invalid (*Respondent's Brief*, p. 32).

In any event, we have the prosecutor's word that "all the allegations [of abusive arguments as made] by the defendants are taken out of context" (*ibid.*). For our part, the various segments of the prosecutor's argument centralized in our petition were not "a few brief sentences in the prosecutor's long and expectantly hortatory closing argument," *Donnelly v. DeChristoforo*, 416 U.S. 627, 647 (1974). Rather these remarks were exemplary of the unparalleled "fire and brimstone" character of an argument that can only be properly labeled as being "almost unheard of in its latitude of vituperation and bitterness," *Lonardo v. Ohio*, 34 Ohio Law Rept. 434 (1931). It follows that this form of prosecutorial misconduct *actually* permeated the entire closing arguments as well as the trial itself.

Hopefully too, this Court will credit our assailment of the prosecutor's summation, in which he committed wrongs of every possible type, as having been sincerely made in hopes of rectification. For, if the arguments made by this prosecutor to the jury, and in defense thereof to this Court, are valid; then it may as well be said there is nothing that can possibly be said by any prosecutor during his summation that would warrant the granting of a new trial.

CONCLUSION

The cogency of the arguments made herein make it clear these petitioners will ultimately be given a new trial. Hopefully, it will be one in which the prosecutor not only evidences that he knows the rules but displays that he possesses that instinct of fairness that gives him the desire to respect them.

Respectfully submitted,

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